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No. 82-271

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

Page

There Is No Conflict Between the Decision of the First Circuit Below and A Recent Decision of the Ninth Circuit 1

Conclusion 3

TABLE OF AUTHORITIES

CASES:	Page
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974)	1
Board of Regents v. *Tomanio*, 446 U.S. 478 (1980)	3
Pavlak v. *Church*, 681 F.2d 617 (9th Cir. 1982)	1

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION

Because Petitioners in their Reply Brief purport to raise a new matter pursuant to Rule 22.6 of this Court's Rules, Respondents submit this short Supplemental Brief in Opposition to Petition for Certiorari.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FIRST CIRCUIT BELOW AND A RECENT DECISION OF THE NINTH CIRCUIT

Petitioners attempt to characterize the Ninth Circuit's recent decision in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982) as standing for the proposition that the tolling rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) applies to Section 1983 actions. However, this is not so.

The *Pavlak* case dealt primarily with a very different issue:

> "The question here is whether, after certification of a Rule 23(b)(3) class is denied, a plaintiff, who was a member of the putative class, may claim that the statute of limitations was tolled pending determination of the certification motion *so that she may file an independent suit.*"

The Ninth Circuit then went on to hold:

> "*American Pipe* permitted a toll of the statute of limitations for a class member who intervened in the action in which class certification was denied, and *we conclude that its rationale cannot be extended to those who do not intervene, or try to do so.*"

681 F.2d at 617-618 (emphasis added). Needless to say, this issue in *Pavlak* is not now before this Court in these cases.

Moreover, as to the tolling issue which Petitioners attempt to raise in these cases, the Ninth Circuit in *Pavlak* made clear that its view of the tolling rule in *American Pipe* would also be followed *as a matter of state law* by the Idaho courts. Thus, the Ninth Circuit asserted:

> "Our Lexis research into Idaho law has disclosed no statute or court decision on point, although Idaho contains a procedural rule identical to Fed.R.Civ.P. 23. We note that we therefore have no basis for identifying the Idaho law on this subject, should we conclude that it is relevant. *We do believe that the courts of Idaho would adopt American Pipe and our reading of it, as the better rule.*"

681 F.2d at 619-620 n.2 (emphasis added).

Consequently, *Pavlak* does not hold what Petitioners claim it does, and there is in reality no conflict between *Pavlak* and the First Circuit's decision in these cases. To

the contrary, state tolling law was properly relied upon by both courts. *See Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.*

Respectfully submitted,

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*Respondents are also constrained to rebut Petitioners' claim that Respondents "for the first time" make the argument that their pendent Puerto Rico statutory claims are sufficient to support the result below. *See* p. 4 of Petitioners' Reply Brief. This is simply untrue. At pp. 49-50 of their Brief in the First Circuit, Respondents made this very argument.